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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 246.

FREDERICK S. DEITRICK, Receiver of the Boston-Continental National Bank, *Petitioner*,

v.

THOMAS E. GREANEY, *Respondent*.

BRIEF FOR FREDERICK S. DEITRICK, RECEIVER OF THE BOSTON-CONTINENTAL NATIONAL BANK, PETITIONER.

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INDEX.

Subject Index.

	Page
Opinions Below	1
Jurisdiction	1
Statement of Facts	2
Specification of Errors	4
Summary of Argument	5
Argument	6
I. Analysis of Question Presented	6
II. The Decision of the Circuit Court of Appeals Should Be Reversed as Unsound in Principle and Contrary to the Underlying Policy of the National Bank Act, as well as Sound Public Policy with Respect to Banking Institutions in General. The Overwhelming Weight of the Authorities Concurs in Imposing Liability in This Situation	12
(A) The Circuit Court of Appeals Erred in Concluding That the Petitioner's Suit on Greaney's Note, Unlike the Stock Assessment Suit, Is Fatally Tainted with Illegality	12
(B) The Decisions Relied upon by the Circuit Court of Appeals Are Not Specifically Applicable to, or Decisive of, the Question Presented	15
(C) The Authorities Support the Position of the Petitioner, and Clearly Reflect a Policy Underlying All Public Banking Systems to Protect the Depositors and Creditors of Banks from Such Spurious Transactions	23
(D) The Provisions of the National Bank Act, Especially with Respect to Examination and Supervision of National Banks by the	

Page

Comptroller of the Currency, Definitely Indicate the Existence of a Policy to Protect Bank Depositors and Creditors, and the Public, from Such Transactions 32

III. If the Law of Massachusetts Is Applicable in This Case, the Decision of the Circuit Court of Appeals Should Be Reversed Because Contrary to the Controlling Decisions of the Supreme Judicial Court of Massachusetts 36

Conclusion 39

Appendix 40

AUTHORITIES CITED.

Cases:

Andresen v. Kaercher, 38 F. (2d) 462 15
Arthur v. Brown, 91 S. C. 316, 74 S. E. 652 29
Ashley v. Rowe, 101 Fla. 110, 133 So. 551 28
Atlantic Trust Co. v. Dana, 128 Fed. 209 9
Awotin v. Atlas Exchange National Bank, 295 U. S. 209 18
Bangor Trust Company v. Christine, 297 Pa. 64, 146 Atl. 545 30
Bank of Slater v. Union Station Bank, 283 Mo. 308, 222 S. W. 993 28
Bay Parkway National Bank v. Shalom, 270 N. Y. 172, 200 N. E. 685 ..... 29, 30, 38
Bell v. Johnson, 142 Kan. 360, 46 P. (2d) 886 29
Best v. Thiel, 78 N. Y. 15 ..... 29, 31
Bohning v. Caldwell, 10 F. (2d) 298 26
Boller v. Field, 260 Ill. App. 488 28
Bosworth v. Cady, 72 F. (2d) 63 15
Brand v. Korth, 99 S. W. (2d) 285 29
Case v. Terrell, 11 Wall. 199 9
Casey v. Cavaroc, 96 U. S. 467 9
Cedar State Bank v. Olson, 116 Kan. 320, 226 Pac. 995 ..... 30, 31
City of Marion v. Sneeden, Receiver, 291 U. S. 262 18
Cook County National Bank v. United States, 107 U. S. 445 32
Cutler v. Fry, 240 Fed. 238 15
Day v. Farmers & Merchants Bank, 229 Ala. 372, 157 So. 439 ..... 29, 31, 38

Page

Deitrick v. Standard Surety Company, 90 F. (2d) 862, aff'd 303 U. S. 471 ..... 15, 18, 33
Denny v. Fishter, 238 Ky. 127, 36 S. W. (2d) 864 ..... 29, 31
De Stefano v. American Chocolate Almond Co., 107 N. J. Eq. 156, 152 Atl. 2 9
Downey v. City of Yonkers, 106 F. (2d) 69 11
Duke v. Stayton Co. 132 Wash, 69, 231 Pac. 171 9
Engen v. Matthys, 50 N. D. 487, 196 N. W. 550 29
Erie R. Co. v. Tompkins, 304 U. S. 64 ..... 10, 11, 36
Farmers' & Merchants' State Bank v. Perry, 186 Wis. 93, 202 N. W. 179 ..... 30, 32
Farmers' State Bank v. Montgomery, 129 Kan. 203, 282 Pac. 741 30
Federal-American National Bank & Trust Co. v. Scott, (Texas Civ. App.) 103 S. W. (2d) 1064 38
Federal Reserve Bank v. Crothers, 289 Fed. 777 26
First National Bank v. Baer, 277 Pa. 184, 120 Atl. 815 38
First National Bank v. Boxley, 129 Okla. 159, 264 Pac. 184 ..... 29, 30, 38
First National Bank v. Brownson, 106 S. W. (2d) 1076 29
First National Bank v. Felt, 100 Iowa 680, 244 Pac. 368 38
First National Bank v. Reed, 198 Cal. 252, 244 Pac. 368 ..... 31, 38
First National Bank v. Sagerson, 283 Pa. 406, 129 Atl. 333 38
First National Bank v. Smith, 200 Atl. 215 38
Fischer v. Hammond, 32 Ariz. 423, 259 Pac. 676 28
German-American F. Corp. v. Merchants' & Manufacturers' State Bank, 177 Minn. 529, 225 N. W. 891 ..... 29, 31
German-American State Bank v. Watson, 99 Kan. 686, 163 Pac. 637 28
Golden v. Cervenka, 278 Ill. 409, 116 N. E. 273 31
Harrington v. Connor, 51 Neb. 214, 70 N. W. 911 31
Hayes v. Addy, 139 Kan. 481, 32 P. (2d) 243 ..... 29, 31, 38
Hookway v. First National Bank, 36 F. (2d) 166 15
Hulse v. Argetsinger, 12 F. (2d) 933 14
Hurd v. Kelley, 78 N. Y. 588 ..... 29, 31
Iglehart v. Todd, 203 Ind. 427, 178 N. E. 685 ..... 9, 29
Industrial Mutual Depositors Co.'s Receiver v. Taylor, 118 Ky. 851, 82 S. W. 574 9

Page

In re Pleasant Hill Lumber Co., 126 La. 743, 52 So. 1010 9
International Trust Company v. Wattendorf, 256 Mass. 323, 152 N. E. 306 ..... 31, 37
Kaercher v. Citizens National Bank, 57 F. (2d) 58 15
Kennedy v. Gibson, 8 Wall. 498 ..... 9, 14
Keyes v. First National Bank of Aberdeen, 20 F. (2d) 678 15
Lensing v. Rayzor, 41 F. (2d) 224 27
Lyons v. Benney; 230 Pa. 117, 79 Atl. 250 ..... 30, 31, 38
Lyons v. Westwater, 181 Fed. 681 25
McCandless v. Furlaud, 296 U. S. 140 23
Moore v. Kildall, 111 Wash, 504, 191 Pac. 394 29
Mt. Vernon Tr. Co. v. Bergoff, 272 N. Y. 192, 5 N. E. (2d) 196 29
Murphy, Receiver v. Gumaer, 18 Colo. App. 183, 70 Pac. 800 ..... 29, 31
Myers v. Department of Financial Institutions, (Ind.) 14 N. E. (2d) 914 31
National Bank of Metropolis v. Kennedy, 17 Wall. 19[illegible] 14
Nelson v. Colegrove, 265 Ill. App. 488 28
New v. Page, 144 Md. 606, 125 Atl. 403 ..... 29, 31
Niblack v. Farley, 286 Ill. 536, 122 N. E. 160 ..... 30, 31
O'Keefe v. Equitable Trust Company, 103 F. (2d) 904 . 34
Park Place Discount Co. v. Taylor, 119 N. J. L. 253, 195 Atl. 520 31
Parker v. Parker, 287 Mich. 49, 282 N. W. 897 ..... 30, 31
Pauly v. O'Brien, 69 Fed. 460 24
Peoples Bank v. Stroud, 223 Pa. 33 39
Peterson v. Baird, 63 N. D. 604, 249 N. W. 690 ..... 29, 31
Peterson v. Tillinghast, 192 Fed. 287 ..... 15, 27
Prudential Trust Company v. Moore, 245 Mass. 311, 139 N. E. 645 ..... 31, 36
Putnam v. Chase, 106 Ore. 440, 212 Pac. 365 ..... 30, 31
Rankin v. City National Bank, 208 U. S. 541 15
Reconstruction Finance Corporation v. O'Keefe, 98 F. (2d) 820 11
Reno National Bank of Reno, Nev. v. Seaborn, 99 F. (2d) 482 11
Rogers v. First State Bank, 79 Colo. 84, 243 Pac. 637 .. 30
Rothschild v. Manufacturers Trust Company, 279 N. Y. 355, 18 N. E. (2d) 527 ..... 30, 35

Page

Ruhlin v. New York Life Insurance Company, 304 U. S. 202 ..... 10, 36
Schmid v. Haines, 115 N. J. L. 271, 178 Atl. 801 30
Schram v. Poole, 97 F. (2d) 566 11
Schram v. Smith, 97 F. (2d) 662 11
Schwenker, Commissioner of Banking v. Teasdale, 206 Wis. 275, 239 N. W. 434 29
Shaw v. Borchers, (Texas) 46 S. W. (2d) 967 29
Skordal v. Stanton, 89 Minn. 511, 95 N. W. 449 31
Skagit State Bank v. Moody, 86 Wash. 286, 150 Pac. 425 31
Skud v. Tillinghast, 195 Fed. 1 15
Spurway v. Lehman, 58 F. (2d) 227 14
Starr v. Schram, 24 F. Supp. 888 11
State Bank of Moore v. Forsyth, 41 Mont. 249, 108 Pac. 914 30
State Bank of Pittsburg v. Kirk, 216 Pa. 452, 65 Atl. 932 ..... 31, 39
State ex rel. Lattanner v. Hills, 94 Ohio St. 171, 113 N. E. 1045 29
Texas & Pacific Ry. v. Pottorff, 291 U. S. 245 ..... 18, 23
Utley v. Clark et al, 16 F. Supp. 435 28
Vallely v. Devaney, 49 N. D. 1107, 194 N. W. 903 30
Warren National Bank v. Jamieson, 301 Pa. 45, 151 Atl. 672 ..... 30, 38
Webb v. Pleasants, 144 Va. 516, 132 S. E. 175 29
West Rutland Tr. Co. v. Houston, 104 Vt. 204, 158 Atl. 69 29
Westwater v. Lyons, 193 Fed. 823 25
Westwater v. Murray, 245 Fed. 427 25
Wichita Royalty Co. v. City National Bank, 306 U. S. 103 11
Willing v. Binenstock, 302 U. S. 272 11
Yates Center National Bank v. Lauber, 240 Fed. 237 .. 15
Yates Center National Bank v. Schaede, 240 Fed. 240, aff'd 240 Fed. 241 15

Page

Statutes and Texts:

Sec. 240(a) of Judicial Code, as amended (U. S. C. title 28, sec. 347 (a)) 1
Sec. 5146 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 72) 37
Sec. 5147 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 73) 27
Sec. 5201 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 83) 2, 6, 8
Sec. 5209 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 592) 9
Sec. 5211 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 161) 33
Secs. 5138-5141, incl., and 5204 and 5234, of Rev. Stat. of 1873, as amended (U. S. C. title 12, secs. 51-56, incl.) 6
Sec. 5239 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 93) 8
Sec. 5240 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 481) 33
Brannan, Negotiable Instruments (6th Ed. 1938) 454-457 and 459 30
High, Receivers (4th Ed.) secs. 314, 320 9
14 Encyc. Social Sciences (1934) 333 23
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38 Harv. L. Rev. (1924) 239 31
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BRIEF FOR FREDERICK S. DEITRICK, RECEIVER OF THE BOSTON-CONTINENTAL NATIONAL BANK, PETITIONER.

OPINIONS BELOW.

The opinion of the District Court of the United States for the District of Massachusetts appears on pages 13 to 17 of the record and is reported in 23 F. Supp. 758. The opinion of the Circuit Court of Appeals modifying the decree of the District Court appears on pages 77 to 90 of the record and is reported in 103 F. (2d) 83.

JURISDICTION.

The jurisdiction of this Court is invoked under sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. title 28, sec. 347(a)).

The decree of the Circuit Court of Appeals for the First Circuit was entered on March 25, 1939 (R. 90-91). The petition for *certiorari* was filed July 29, 1939, a thirty-five day extension of the time therefor having been first duly granted by Mr. Justice Frankfurter.

The order of this Court granting a writ of *certiorari* was issued October 9, 1939.

STATEMENT OF FACTS.

In April, 1930, Boston National Bank purchased 190 shares of its own stock, in violation of the National Bank Act[1] (R. 13, 17). Several months later, in order to conceal this illegal acquisition and ownership from the national bank examiners, who were then examining the bank (R. 30-31), and to avoid the consequences thereof, a scheme was devised whereby the stock would not appear among the assets of the bank, but would be replaced by a note of some person (R. 13).

Defendant Greaney was a shareholder of Boston National Bank (R. 34, 56), and a director thereof from 1923 until the day it closed (R. 30). Ulin, the president of the bank, and Greaney discussed plans for disposing of the 190 shares (R. 30-31). Greaney thereafter prevailed upon one Karnow to execute a note in the amount of $23,500, payable to the bank. Karnow's note was discounted by the bank, and he was given a check drawn on the bank in the amount of $23,203.14. In accordance with the agreement between the parties, Karnow deposited this check in another bank to the

[1] "No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association, according to section fifty-two hundred and thirty-four." Section 5201 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 83).

credit of Director Greaney. Greaney then issued his own check drawn against the deposit in the other bank payable to Boston National Bank for the full amount of the deposit. This check was delivered to Boston National Bank as the purchase price of said stock, and the shares were then transferred on the books of the bank to Greaney (R. 13-14). When Karnow's note became due he was persuaded to renew it and shortly thereafter he caused the stock to be transferred on the bank's record to his own name and he took actual possession of the new certificates (R. 14).

In the fall of 1930, a consolidation of Boston National Bank and Continental National Bank was effected, and the 190 shares of Boston National Bank stock were converted into 684 shares of stock of the consolidated bank. In connection with this consolidation, one Ragan (who became president of the consolidated bank), together with one Balter, agreed to purchase these, and other, shares. They gave the bank several notes, three of which, aggregating $24,000, were given by the bank to Greaney with the understanding that the stock was to be delivered as the notes were paid. One of these notes (for $9,500) was paid; this amount was credited to Karnow's note; and at Greaney's request a proportionate number of the shares were released by Karnow and transferred from Karnow's name to the purchasers' (R. 14-15).

Later, because of Karnow's insistence that he be relieved from liability, Greaney gave the consolidated bank his own note for $14,553.66, and this note was discounted by the bank and its check used to discharge the Karnow note (R. 15). At Greaney's request the shares were transferred into the name of one Mahoney, who had no knowledge of the transaction at any time prior to the commencement of this suit (R. 15, 21).

In December, 1931, Boston-Continental National Bank closed its doors, and a receiver was appointed by the Comptroller of the Currency to administer its affairs (R. 14). At that time, as theretofore, Greaney's note was held by

the bank among its regular assets, and was wholly unpaid (R. 26). On July 11, 1932, the Comptroller of the Currency levied a 100 per cent assessment upon all owners of stock of the bank (R. 15).

In 1935, the petitioner sued Greaney, Karnow, and Mahoney for the amount of the unpaid assessment on the shares in Mahoney's name, with interest, and sued Greaney and Karnow for the amount of the unpaid note, with interest (R. 4, 13). The decree of the District Court held Greaney liable for the amount of the note and the amount of the assessment, both with interest, and dismissed the bill of complaint with respect to Karnow and Mahoney (R. 12). Greaney appealed, and the Circuit Court of Appeals affirmed the decree of the District Court with respect to Greaney's liability for the stock assessment but reversed the decree as to liability on the note (R. 90). This Court granted a writ of *certiorari* with respect to Greaney's liability on the note, but refused to grant a writ of *certiorari* on a cross petition filed by Greaney with respect to his liability for the stock assessment.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

1. In holding that where a note is given to a national bank by a director thereof in order to conceal from the national bank examiners and the Comptroller of the Currency its true condition and its commission of illegal acts, the maker of such note may set up as a defense that the note was given for the accommodation of the bank and lacked consideration.

2. In holding that the receiver of an insolvent national bank is barred from enforcing a note because of the bank's participation in an unlawful act connected with the giving of the note.

3. In holding that the receiver of an insolvent national bank, who represents primarily the depositors and other

creditors of the bank, is in no better position, with respect to recovery on such a note, than the bank itself would have been, suing as a solvent institution.

4. In failing to hold that the receiver of an insolvent national bank may enforce a note given to the bank by a director thereof in order to conceal from the national bank examiners an illegal acquisition by the bank of shares of its own stock.

5. In failing to affirm the decree of the District Court holding Greaney liable on his note.

6. In the event that the question of Greaney's liability on his note is governed by the law of Massachusetts, in failing to apply the rule established by the decisions of the highest Court of that State.

SUMMARY OF ARGUMENT.

This is a suit upon a promissory note by the receiver of an insolvent national bank. The respondent defends on the ground that the note was given without consideration and in order to deceive the national bank examiners and to conceal from them the bank's violation of the banking laws, and that it was subject to a secret understanding that it would not be enforced.

This controversy must be governed *either* by Acts of Congress or by the law of Massachusetts (in which State the contract was made and was to be performed).

If the case is governed by Acts of Congress, it must be by virtue of a policy inherent in the National Bank Act, for there is no specific statutory provision with respect to this question. It would be preposterous to contend that the policy of the National Bank Act is to protect persons engaging in transactions inimical to the soundness of the national banking system. On the contrary, it affirmatively appears from the powers of examination and supervision vested in the Comptroller of the Currency that the statu-

tory policy is absolutely opposed to any device or scheme calculated to give a fictitious and deceptive appearance to the assets of a national bank. By virtue of this policy, which forms an integral part of the National Bank Act, the petitioner is entitled to enforce this promissory note for the benefit of the very class of persons whom the National Bank Act is primarily designed to protect: the depositors and other creditors.

The overwhelming weight of the authorities concurs in permitting recovery in these circumstances by receivers of both state and national banks.

If the case is governed by the law of Massachusetts, the petitioner clearly is entitled to enforce the note, under the applicable decisions of the highest Court of that State.

ARGUMENT.

I.

Analysis of Question Presented.

(A) The question here presented is simply whether the receiver of a national bank as the representative of its depositors and other creditors is entitled to enforce a promissory note knowingly given to the bank by one of its directors for the specific purpose of deceiving the national bank examiners, and through them the Comptroller of the Currency and the public represented by him, with respect to the condition of the bank, and to conceal the fact that the bank and its directors had violated the provision of the National Bank Act forbidding national banks to purchase shares of their own stock.[2]

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[2] Section 5201 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 83), *supra*, page 2, note 1.

In the Appendix are set forth other statutory provisions which indicate the importance attached by Congress to the establishment and preservation of adequate capitalization for national banks. See particularly Secs. 5138, 5139, 5140, 5141, 5204, and 5234 of Rev. Stat. of 1873, as amended (U. S. C. title 12, secs. 51-56, incl.)

The present suit was instituted by the receiver for the purpose of enforcing one of a number of promissory notes which were among the assets of the bank when it closed. This note is in the ordinary form without anything to indicate that it is other than a valid and subsisting obligation. Greaney, the maker, who was a director of the bank, seeks to escape liability by setting up a secret oral understanding with other directors and officers of the bank to the effect that he would not be held liable on the note, and by asserting that the note was made and given in order to conceal an illegal transaction and to deceive the national bank examiner and the Comptroller of the Currency and thus to frustrate them in the performance of their duty to protect the integrity and safety of the national banking system as well as the public, including those members thereof who were depositors or creditors of the bank.

The Circuit Court of Appeals for the First Circuit ruled that Greaney may set up as a defense that his note was given for the accommodation of the bank; and that instead of Greaney being precluded from asserting this defense by reason of his participation in the illegal enterprise, the receiver of the closed bank is not permitted to enforce payment because of the bank's participation in the unlawful acts. That Court stated that certain federal court cases cited by it, discussed hereinafter, establish a rule to the effect that "where a note is given to a national bank without consideration and for its accommodation to conceal its true financial condition from a national bank examiner or the Comptroller's office, the maker may set up the defense of lack of consideration as against the receiver of a closed national bank" (R. 84).

We respectfully submit that these rulings of the Circuit Court of Appeals were erroneous.

In purchasing 190 shares of its own outstanding capital stock, Boston National Bank and the participating directors and officers were guilty of a violation of the National

Bank Act which would have justified the Comptroller of the Currency in taking steps to terminate the bank's existence (Sections 5201 and 5239 of Rev. Stat. of 1873, as amended (U. S. C. title 12, secs. 83 and 93); see Appendix), or, at least, in requiring the prompt correction of the situation resulting from the illegal act. (As a matter of practice, it is probable that if the illegality had come to light, the examiner would have required that the illegally acquired stock be replaced promptly by cash equal to the amount illegally expended therefor.)

In order to avoid either of the possible results mentioned above, the president of the bank devised a scheme for concealing the illegal purchase and retention from the bank examiners and the Comptroller of the Currency. Greaney, who had long been a director of the bank, was a party to this scheme from its inception, and it was he who persuaded Karnow to give the bank his note to take the place of the stock. Later, in further pursuance of the general plan of concealment, Greaney gave to the bank his own promissory note for $14,533.66 to replace Karnow's note, which had been reduced to that amount, and the remaining shares of illegally held stock were thereupon registered in the name of Greaney's nominee, and the new certificates were delivered to, and retained by, Greaney.

The defense interposed by Greaney in this suit amounts simply to this: It was the intent of the parties to this deception that the illegally acquired stock should remain the property of the bank, and that Greaney's note should merely hide such ownership and should never be enforced against him. The question before the Court is whether, in this situation, such a defense should be upheld.

As the result of the scheme and deception outlined above, the national bank examiners were deceived and kept in ig-

norance of the bank's illegal acquisition of its own stock,[3] which had reduced and impaired to that extent the capital which was supposed to serve as protection for depositors and other creditors of the bank. For approximately one and one-half years, the Boston National Bank and its successor, the Boston-Continental National Bank, continued to conduct a banking business. In December of 1931, the Comptroller found the Boston-Continental National Bank to be insolvent and appointed a receiver to wind up its affairs.

In this suit the receiver is acting for the benefit of the depositors and creditors,[4] and for the purposes of the matter here involved it would be highly technical and unreal to say that the receiver only represents and stands in the place of the defunct association, and is subject to every defense which would be good against it. The persons whom

[3] *Cf.* Sec. 5209 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 592):

> "Any officer, director, agent, or employee * * * of any national banking association * * * who makes any false entry in any book, report, or statement of * * * such national banking association * * *, with intent in any case * * * to deceive * * * the Comptroller of the Currency, * * * or any agent or examiner appointed to examine the affairs of * * * such national banking association * * *, and every person who, with like intent, aids or abets any officer, director, agent, employee, or receiver in any violation of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof in any district court of the United States shall be fined not more than $5,000 or shall be imprisoned for not more than 5 years, or both, in the discretion of the court."

[4] For authority that a receiver represents creditors as well as the bank and may sue in their behalf, see: *Kennedy* v. *Gibson*, (1869) 8 Wall. 498, 506; *Case* v. *Terrell*, (1870) 11 Wall. 199, 202; *Casey* v. *Cavaroc*, (1877) 96 U. S. 467, 489; *In re Pleasant Hill Lumber Co.*, (1910) 126 La. 743, 757, 52 So. 1010; *Duke* v. *Stayton Co.*, (1924) 132 Wash. 69, 77, 231 Pac. 171; *Atlantic Trust Co.* v. *Dana*, (C. C. A. 8th, 1903) 128 Fed. 209, 221; *De Stefano* v. *American Chocolate Almond Co.*, (1930) 107 N. J. Eq. 156, 159, 152 Atl. 2; *Industrial Mutual Depositors Co.'s Receiver* v. *Taylor*, (1904) 118 Ky. 851, 854, 82 S. W. 574; *Iglehart* v. *Todd*, (1931) 203 Ind. 427, 440, 178 N. E. 685; High, Receivers (4th ed.) secs. 314, 320.

he represents had no hand in, and were unaware of, the deception and scheme; they were, in fact, the victims of the deception and would be the sufferers if Greaney were permitted now to disavow his prior representations. In other words, Greaney now claims the right to deny liability upon his note, which the national bank examiners considered to be a valid and subsisting asset of the bank. This asserted privilege he bases on the secret oral understanding between him and other officers and directors of the bank.

(B) Unless the situation here presented is "governed by the Federal Constitution or by Acts of Congress", the substantive law to be applied is that of the state (Massachusetts) in which the parties resided and in which the contract was made and was to be performed. *Erie R. Co.* v. *Tompkins* (1938), 304 U. S. 64; *Ruhlin* v. *New York Life Insurance Co.* (1938), 304 U. S. 202. On the other hand, if the matter is within the purview of a federal statute or general statutory scheme or policy, the decision should be based upon the language and intent of such governing statutes.

The determination of the applicable law depends solely upon whether the matter is one governed by the Federal Constitution or Acts of Congress. There is no federal statutory provision expressly and specifically relating to this question and, accordingly, if it were held to be governed by Acts of Congress it would have to be on the basis that the Acts of Congress relating to national banks evidence a purpose or underlying policy to assure effective examination, regulation and supervision of such banks by the Comptroller of the Currency and his examiners, which must be recognized as an intrinsic, although implied, part of the National Bank Act.

This Court and inferior federal courts have indicated that some classes of controversies arising in connection with receiverships and liquidations of national banks are subject to the law of a particular state in accordance with

the ordinary principles governing the conflict of laws. *Cf. Willing, Receiver* v. *Binenstock* (1937), 302 U. S. 272 (offsets); *Downey* v. *City of Yonkers* (C. C. A. 2d, 1939), 106 F. (2d) 69; *Reconstruction Finance Corporation* v. *O'Keefe* (C. C. A. 3rd, 1938), 98 F. (2d) 820 (secured claims); *Reno National Bank of Reno, Nev.* v. *Seaborn* (C. C. A. 9th, 1938), 99 F. (2d) 482 (preferences). However, the precise scope of *Erie R. Co.* v. *Tompkins* (1938), 304 U. S. 64, in the national banking field has not been fully delineated. *Cf. Wichita Royalty Company* v. *City National Bank* (1939), 306 U. S. 103; *Schram* v. *Poole* (C. C. A. 9th, 1938), 97 F. (2d) 566; *Schram* v. *Smith* (C. C. A. 9th, 1938), 97 F. (2d) 662; *Starr* v. *Schram*, (E. D. Mich., 1938), 24 F. Supp. 888.

The administration and supervision of the National Banking System by the Comptroller of the Currency would be facilitated and aided by a decision of this Court holding that matters of this type, where officers and directors of national banks through deceptive practices deliberately interfere with and seek to frustrate the effective functioning of the national bank examiners, are "governed by" the National Bank Act. Nevertheless, pursuant to his duty to the depositors and other creditors of the Boston-Continental National Bank receivership, and pursuant to instructions of the Comptroller of the Currency, the petitioner has briefed the question before the Court on each of the alternatives mentioned in the first paragraph of this subsection (B).

As far as the outcome of this particular case is concerned, it is believed to be immaterial whether the matter is subject to the law of Massachusuetts or is governed by the National Bank Act, since the law of Massachusetts (like the law of practically all other states whose courts have considered this question) is in accord with the obvious purpose of the National Bank Act to protect depositors and creditors of national banks from just such fraudulent transactions on the part of officers and directors thereof as are involved in this case. In view of this absence of conflict, the Court may deem it unnecessary to determine the question of the applicable law.

II.

The Decision of the Circuit Court of Appeals Should be Reversed as Unsound in Principle and Contrary to the Underlying Policy of the National Bank Act, as Well as Sound Public Policy With Respect to Banking Institutions in General. The Overwhelming Weight of the Authorities Concurs in Imposing Liability in This Situation.

(A) The Circuit Court of Appeals erred in concluding that the petitioner's suit on Greaney's note, unlike the stock assessment suit, is fatally tainted with illegality.

While the Circuit Court of Appeals ruled that Greaney could deny liability on the note, it also ruled that "a different situation" existed with respect to the stock assessment, so that Greaney could not deny ownership of the stock and thus escape the assessment liability. The reasons advanced for such a distinction are contained in the following extracts from the opinion below:

> "* * * Such an assessment is lawful. It is independent of any method by which the stockholder acquired the stock. It is authorized by the National Banking Act, 12 U. S. C. A. 191, 192, and falls on every person who in law may be treated as the owner of the stock.
>
> "The assessment in this case was not made pursuant to any unlawful acts by the officers of the bank, in which they participated, *Trustees of Somerset Academy* v. *Picher*, 90 Fed. (2d) 741, 744. Any judgment recovered on an assessment is not for the benefit of the bank, but is for the benefit of creditors of the bank. *Dunn et al.* v. *O'Connor et al.*, 89 Fed. (2d) 820, 826; *Page* v. *Jones*, 7 Fed. (2d) 541, 544, cert. denied, 269 U. S. 587" (R. 84-5).
>
> "Greaney's status in the suit by the receiver to collect the assessment is not affected by his participation in the unlawful transaction between him, Ulin and the Boston National Bank. The Comptroller was not a party to any unlawful transaction. On this branch of

> the case Greaney is not sued on his note by a party equally guilty as himself of unlawful acts. The imposition of the liability for the assessment of the Comptroller is statutory and is independent of any liability of Greaney on his note or lack of it. Greaney as against the lawful acts of the Comptroller could not set up as a defense an unlawful transaction in which he participated, but in which the Comptroller did not participate" (R. 87-8).

As these extracts indicate, the court below enforced the stock assessment against Greaney on the ground that the "assessment is lawful" and "was not made pursuant to any unlawful acts by the officers of the bank". With respect to the note, however, it said:

> "Appointment of a receiver does not absolve such a note of the taint of illegality. His rights are in no way superior to the rights of the bank, and the time-honored principle denying enforcement of illegal obligations holds."

Certainly there is nothing unlawful in the petitioner's suit on either aspect of the case. As a matter of fact, the applicability of the assessment to Greaney flowed from the "unlawful act" of Greaney and the bank's officers in fraudulently transferring the stock to Greaney's nominee while retaining secret beneficial ownership in the bank—the very transaction which gave rise to the note here in suit. The "Comptroller did not participate" in this transaction in *any* respect.

It is earnestly contended, therefore, that the distinction drawn by the Circuit Court of Appeals rests upon an erroneous theory, and lacks any real and factual justification. Apparently the court had in mind the fact that the immediate basis for recovery on one aspect was the note given to the bank as a going concern, whereas on the other aspect it was an assessment order made subsequent to suspension. But, of course, the assessment was based upon the ownership of the stock transferred to Greaney at

the time he gave this note to the bank, and therefore is as much—or as little—connected with the illegality and deceit as is the suit on the note itself.

The opinion states in effect that the suit against Greaney on the note is being maintained "by a party equally guilty as himself of unlawful acts", and for this reason Greaney is entitled to escape. This highly technical position, based solely on the circumstance that the note was among the assets found in the bank when the receiver took charge, disregards the realities of the situation. Elsewhere the Circuit Court of Appeals emphasized that

> "Any judgment recovered on an assessment is not for the benefit of the bank, but is for the benefit of creditors of the bank."

However, it apparently failed to realize that this is precisely and fully as true with respect to recovery on the note. Both aspects of this suit were brought for the benefit of this class by their representative, the agent of the Comptroller of the Currency,[*] who, as the court stated, was "not a party to any unlawful transaction". The judgments on both the note and the assessment will equally accrue to the benefit of the depositors and other innocent creditors. With a deliberate design to deceive the bank examiners, and present and prospective depositors, Greaney placed this note among the assets of the bank and took title to the stock. Judgment against him in this case, on both aspects, will be for the benefit of the persons whom he deceived and injured. The court below enunciated the correct principle in speaking of the stock assessment liability:

> "Greaney as against lawful acts of the Comptroller could not set up as a defense an unlawful transaction

[*] For authority that receiver is an officer or agent of the Comptroller of the Currency, see *Kennedy* v. *Gibson*, (1869) 8 Wall. 498, 505; *National Bank of Metropolis* v. *Kennedy*, (1872) 17 Wall. 19, 22; *Huls* v. *Argetsinger*, (W. D. N. Y. 1926) 12 F. (2d) 933, 935; *Spurway* v. *Lehman*, (C. C. A. 5th, 1932) 58 F. (2d) 227, 228; *cert.* denied 287 U. S. 621.

in which he participated, but in which the Comptroller did not participate."

Our position is simply that this rule is fully as applicable to the suit upon the note as to the suit upon the stock assessment.

(B) The decisions relied upon by the Circuit Court of Appeals are not specifically applicable to, or decisive of, the question presented.

On the question of liability on the note, the Circuit Court of Appeals cited and relied upon *Rankin* v. *City National Bank* (1908), 208 U. S. 541, its own decision in *Deitrick* v. *Standard Surety Co.* (1937), 90 F. (2d) 862, several cases decided by the Circuit Court of Appeals for the Eighth Circuit and the District Court for the District of Kansas, and one decision of the Circuit Court of Appeals for the Sixth Circuit.* Since the decisions after the *Rankin* case were based upon a general principle supposedly enunciated therein, the relevant facts and the scope of the decision in that case warrant the following full discussion.

For the purpose of deceiving the national bank examiner by removing three criticized loans in the aggregate amount of $30,000 from the assets of the Guthrie National Bank, the president of that bank (named Billingsley) executed his personal note in favor of the City Bank and received a credit of $30,000 in his personal account in the City Bank,

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* *Peterson* v. *Tillinghast*, (C. C. A. 6th, 1911) 192 Fed. 287; *Hookway* v. *First National Bank*, (C. C. A. 8th, 1929) 36 F. (2d) 166; *Andresen* v. *Kaercher*, (C. C. A. 8th, 1930) 38 F. (2d) 462; *Cutler* v. *Fry, Yates Center National Bank* v. *Lauber, Same* v. *Schaede*, (D. Kan. 1915) 240 Fed. 238, 237, 240, (the last was affirmed without opinion (C. C. A. 8th, 1916) 240 Fed. 241).

Cases not cited by the court below but standing for the same principal are: *Skud* v. *Tillinghast*, (C. C. A. 6th, 1912) 195 Fed. 1; *Bosworth* v. *Cady*, (C. C. A. 8th, 1934) 72 F. (2d) 63; *Kaercher* v. *Citizens National Bank*, (C. C. A. 8th, 1934) 57 F. (2d) 58; *Keyes* v. *First National Bank of Aberdeen*, (D. S. D. 1927) 20 F. (2d) 678.

under an agreement that the credit could be applied on his note at any time. By a circuitous route, the $30,000 credit in Billingsley's personal account was transferred to the credit of a special account of the Guthrie Bank in the City Bank, and the records of the Guthrie Bank thereupon showed an additional asset of $30,000 without showing Billingsley's note as a counterbalancing liability. By this device, the credit of the Guthrie Bank on the books of the City Bank was substituted for the three criticised loans aforementioned. Prior to the time the Guthrie Bank was closed because of insolvency, and without knowledge of its failing condition, the City Bank charged Billingsley's note against the special account of the Guthrie Bank. Later the Guthrie Bank was declared insolvent, and its receiver instituted suit against the City Bank to recover the amount which had been used to pay off the note of Billingsley, on the ground that the note represented the president's own personal obligation and not that of his bank. This Court held that the note was in reality the obligation of the Guthrie Bank and denied relief to the receiver. It expressly stated (208 U. S. at 545) that "* * * in the Circuit Court both counsel agreed that it was not contended that the contract was illegal because it enabled a false showing to be made of the condition of the Guthrie Bank". Under these circumstances, this Court held that the receiver could not recover from the City Bank, and added:

> "If the Guthrie Bank had sued while it was a going concern it would not have recovered, and the receiver stands no better than the bank."

In this connection it is to be specially noted, as pointed out by this Court, that at the time the City Bank charged Billingsley's note against the Guthrie Bank's account, it had no knowledge that the Guthrie Bank was in a failing condition; thus, prior to the suspension of the Guthrie Bank, the City Bank had seasonably and in good faith

extricated itself from the whole transaction. In that case, therefore, there was some basis for the quoted statement, but it should be noted that the question as to whether the rights of a receiver can rise higher than those of the bank, as a general principle, was raised neither in the briefs nor in the record before the Court in that case.

The theory of the *Rankin* case was followed by the District Court in the instant case when it held that Karnow, who executed the original note used to take out of the bank the illegally acquired bank stock, having extricated himself from the entire situation seasonably, in good faith and without apprehension of the failing condition of the bank, could not be held liable by the receiver (R. 16). The situation of Greaney is very different, for when the receiver was appointed and took over the assets of the insolvent national bank there was among the assets a note executed by Greaney which purported to be a valid and subsisting obligation. In these circumstances, it is contended by petitioner, the above-quoted language of the *Rankin* case is not applicable, and the receiver stands better than the bank itself.[7]

An additional important factor which should be kept in mind is that whereas in the *Rankin* case the irregular transaction was one between two banks, in the instant case the defendant was a director of the bank, fully acquainted with its affairs and the illegal transaction which he was assisting to conceal, despite the fiduciary duty which he owed its depositors.

It is respectfully submitted that whereas in the *Rankin* case the receiver may not have stood better than the bank because the defendant City Bank had extricated itself from the irregular transaction prior to the Guthrie Bank's suspension, in good faith, and without knowledge of the impending insolvency, the adoption by the Circuit Court

[7] It is assumed at this point, *arguendo gratia*, that the bank itself would not have been entitled to enforce the note. But see pp. 24 and 30, notes 9 and 14, *infra*.

of Appeals of a construction of the language of the *Rankin* case as establishing an invariable rule decisive of the present cause, was unwarranted and erroneous. Every decision relied upon by the Circuit Court of Appeals on this point and practically every decision of the federal courts which is in accord with those cases is based upon the same erroneous application of the language contained in the *Rankin* case.

The *rationale* of some of the cases cited in the decision below (*e. g., Cutler* v. *Fry, Yates Center National Bank* v. *Schaede, Sante* v. *Lauber*, all *supra*) appears to be that a receiver, on behalf of depositors, can in no circumstances have the benefit of a promise contained in a note without assuming the burden of the bank's counter-promise that the note will not be enforced. However, this Court has decided that in certain cases a national bank itself or—after its insolvency—its receiver may enjoy the benefits of an *ultra vires* contract without assuming the burden thereof. See *Augotin* v. *Atlas Exchange National Bank* (1935), 295 U. S. 209; *Texas & Pacific Ry.* v. *Pottorff* (1934), 291 U. S. 245; *City of Marion* v. *Sneeden, Receiver* (1934), 291 U. S. 262.

The Circuit Court of Appeals also relied upon its own decision in the case entitled *Deitrick* v. *Standard Surety Company* (C. C. A. 1st, 1937), 90 F. (2d) 862, which was affirmed by this Court in (1938) 303 U. S. 471. The affirmance of that case by this Court was based primarily upon the condition of the pleadings, and in this connection, this Court stated in the next to the last paragraph of the majority opinion:

> "An examination of the pleadings makes it quite clear that the Receiver undertook to set up rights acquired by the insolvent bank through duly executed contracts between it and the Surety Company. He makes no suggestion of a purpose attributable to the company to mislead creditors or others; makes no allegations of damage except that sustained by the bank. He sets up no facts which would render unconscionable

a denial of liability upon the bond because of the agent's fraud obviously induced by the president of the bank. In this state of the pleadings the Receiver may not have judgment; he cannot rely on something not complained of, nor can he have damages because of supposed deceptions which the pleadings fail to suggest'' (303 U. S. at 480).

The situation with reference to the pleadings in the instant case, however, is substantially different: The allegations in the amended bill of complaint (R. 2, 3) set forth, in substance, the various steps by which the respondent Greaney, who was a director of the bank, took part in the removal from the bank of the 190 shares of its own stock which it had illegally acquired and continued to hold, and the substitution of the note of Karnow and thereafter of the note of Greaney in lieu thereof, and the payment for said shares of stock out of the funds of the bank itself, resulting from the discounting of said notes. It is therefore clear from the face of the bill of complaint that respondent Greaney, with the cooperation of the officers of the bank, executed the note upon which he is sought to be held liable, as part of a plan to remove the illegally held stock and conceal the real condition of the bank in that respect by the substitution of the notes in question. The only purpose which can be reasonably inferred from the activities so described was to have the bank's assets appear, for purposes of examination, in other than their true condition.

In addition, it is important to note that respondent Greaney, in his answer (R. 7-10), denies liability on the ground that the notes were executed on behalf and for the accommodation of the bank, and in substance states that the purpose was to prevent the stock from appearing among the bank's assets, the arrangement being worked out at the request of and in conjunction with the president of the bank (Respondent's answer, Par. 9; R. 9).

Referring now to the above quoted extract from the opinion of this Court in the *Standard Surety Company* case,

considered in the light of the pleadings and issues in the instant case, it affirmatively appears that the pleadings in the instant case do make "suggestion of a purpose attributable to" respondent "to mislead creditors or others * * *"; and further, said pleadings do set up "facts which would render unconscionable a denial of liability * * * upon the note".

The last paragraph of the majority opinion of this Court in the *Standard Surety Company* case cited *Rankin* v. *City National Bank, supra,* stating that

> "We adhere to the doctrine there approved and regard it as decisive of the present cause."

For the reasons set forth above, the facts of the *Rankin* case may have justified the statement therein that "If the Guthrie Bank had sued while it was a going concern it could not have recovered, and the receiver stands no better than the bank." However, it is with deference urged that this broad doctrine was not decisive of the question presented in *Deitrick* v. *Standard Surety Co., supra,* and should not have been relied upon, as it apparently was, as an alternative ground for the Court's disposition of that case.

Although the Circuit Court of Appeals relied on the cases cited on page 15, *supra,* as establishing a binding rule of decision, it is submitted that none of those cases is analogous to the question before the Court. Not one involved a note given by a **director** who had full knowledge of the illegality involved and whose action was a part of a scheme to deceive the bank examiners and thus avoid the application of correctives by the governmental supervising authority which might diminish the ostensible value of the director's investment in the bank.

Under the doctrine applied in those cases above discussed, which were relied upon by the respondent and by the Circuit Court of Appeals, the maker of a promissory note given to a public banking institution in order to con-

ceal a worthless asset or an illegal transaction, with the intent that it should have the appearance of a sound asset of the bank and be so regarded by the bank examiners and thus avoid the application of correctives by the Comptroller of the Currency (or comparable state authority) can escape liability, after the bank becomes insolvent, by pleading lack of consideration and setting up a secret understanding between the maker and officers of the bank to the effect that he would not be held liable on the note.

The Circuit Court of Appeals has extended this principle, which we believe to be wholly unsound, to enable a conspiring director, who has a financial interest at stake and stands to benefit by the deception, to escape liability on the same grounds.

This doctrine, if allowed to stand by this Court, would materially reduce the effectiveness of the Comptroller of the Currency and his examiners in the administration of the national banking system for the protection of the public, and to that extent would defeat the very ends for which Congress granted the Comptroller such powers with respect to national banks. It would make it possible for a national bank to be despoiled by a conspiracy of officers and directors of the bank, and when the Government, as the guardian of the interests of the depositors, stepped in to salvage such assets as then remained, the conspiring officers or directors, whose promissory obligations were the instruments of the fraud, could escape liability by asserting that the obligations were not supported by any real consideration, or that a faithless bank official had agreed, purportedly on behalf of the bank, that the obligations would not be enforced and would be utilized merely for the purpose of deceiving the examiners.

In brief, certain inferior federal courts have drawn from the *Rankin* decision a general rule to the effect that in no circumstances can the receiver of an insolvent bank enforce obligations which could not have been successfully enforced

by the bank as a going institution. Specifically, they have held that the defense of absence of consideration may be interposed to escape liability on a note or other obligation deliberately executed and delivered to the bank for the sole purpose of concealing from the public examining authorities either financial weakness or violations of law. We believe that the facts of the *Rankin* case show that no such general rule was intended to be stated therein; but in any event such a rule would be unsound in principle and inevitably productive of undesirable results.

However, in this case it is not essential, although desirable, that the Court disapprove these decisions *in toto*. Unlike all of the precedents cited by the Circuit Court of Appeals, the instant case is against a defendant who was a director of the bank, sworn to "diligently and honestly administer the affairs of such association", and with a substantial financial benefit to be derived from the illegal deception in which he took a leading part. In these circumstances, involving flagrant breach of trust and motives of personal benefit, liability should certainly be imposed, even if escape were to be allowed in situations not involving such a high degree of culpability or motives of personal advantage. As shown below, **liability has been imposed in every discovered decision of the federal and state courts relating to directors of state or national banking institutions.**

In addition to its reference to the federal court cases discussed above, the Circuit Court of Appeals stated that its conclusion was supported by "all the cases bearing upon the liability of the maker of such a note given to a national bank for its accommodation, to enable it to conceal from a national bank examiner and the Comptroller of the Currency its true financial condition". It is respectfully submitted that this statement is completely erroneous. As shown in the following section, the overwhelming weight of the authorities concurs in imposing liability in this situation, in connection with both national and state banks.

A number of decisions involving national banks are collected on page 38, note 20, *infra*.

(C) The authorities support the position of the petitioner, and clearly reflect a policy underlying our public banking systems to protect the depositors and creditors of banks from such spurious transactions.

In showing that the overwhelming weight of authority is contrary to the position taken by the Circuit Court of Appeals, we will refer to the decisions of both state and federal courts in cases involving insolvent state banks as well as insolvent national banks, because all the states have banking systems in general similar, in their organization and operation, to the national banking system.*

Before entering into a discussion of those cases which have dealt with problems similar to the one before this Court, we wish to point out that the ruling of the Circuit Court of Appeals that the rights of the receiver of an insolvent national bank are in no way superior to the rights of the bank itself, is in conflict with the principle applied by the Court in *Texas & Pacific Ry.* v. *Pottorff*, (1934) 291 U. S. 245. See also *McCandless, Receiver* v. *Furland*, (1935) 296 U. S. 140, 159, 160.

The decision in the *Pottorff* case upheld the right of a receiver of an insolvent national bank to recover securities which the bank had illegally pledged to secure deposits by the railroad. This Court rejected the argument that the receiver was the representative of the bank alone and as such could "have no greater right" than the bank. It recognized that the receiver of an insolvent national bank may in some circumstances be entitled to enforce rights which the bank, as a going institution, could not have enforced, stating that "even if the bank would have been estopped from asserting lack of power, its receiver would be free to challenge the validity of the pledge" (291 U. S. at 260).

In addition, the Court pointed out that "It is the duty of the receiver of an insolvent corporation to take steps to

* See 11 Encyc. Social Sciences (1933) 186, 14 *Id.* (1934) 333.

set aside transactions which fraudulently or illegally reduce the assets available for the general creditors, *even though the corporation itself was not in a position to do so*" (291 U. S. at 264; italics added).

McCandless, Receiver v. *Furland, supra*, raised the question of the right of the receiver of an insolvent corporation to recover from its promoters unconscionable profits obtained by selling land to it and marketing its securities. This Court held that the rights of creditors rose superior to a fraudulent attempt by the corporation and its insiders to impair its assets. "If the shareholders and the directors had combined with the promoters to despoil the corporation and defeat the remedies of creditors by a gift of half the assets, the gift could have been annulled either by the creditors directly or in their behalf by a receiver" (296 U. S. at 159). Again it was recognized that the creditors of a corporation, represented by its receiver, can assert right which might not be enforceable by the corporation as a going concern. Although a minority of this Court contended that "The receiver's rights could rise no higher" than the corporation's rights (page 171), the majority rejected that viewpoint, and stated:

> "There is no occasion to consider whether the corporation itself at the instance of new shareholders would be permitted to disaffirm the fraud and maintain a suit in equity for appropriate relief. We put that question by. *Enough that the receiver has the requisite capacity.*" (296 U. S. at 160; italics added.)

Turning to the decisions upon the question here involved, we find that the earliest federal case sustaining the petitioner's position is *Paulv. O'Brien*, (C. C. S. D. Cal. 1895) 69 Fed. 460. In that case it was held that the receiver of

"It should be mentioned that some of the leading decisions of this question by the highest courts of the several states reflect a tendency to hold such a note as that involved in this case enforceable not only by the receiver, but by the bank itself. See cases cited in note 14 on page 30, *infra*.

an insolvent national bank could recover on a promissory note which the maker had given to the bank in order to enable the bank to remove from its assets a note which was considered practically worthless. The court said (at page 461):

> "It will never do for the courts to hold that the officers of a bank, by the connivance of a third party, can give to it the semblance of solidity and security, and, when its insolvency is disclosed, that the third party can escape the consequences of his fraudulent act."

Lyons v. *Westwater*, (C. C. A. 3rd, 1910) 181 Fed. 681 and (1912) 193 Fed. 817, presented a situation very similar to that of the instant case. The receiver of the insolvent Cosmopolitan National Bank brought action upon a promissory note which had been used to conceal from the Comptroller of the Currency the fact that 300 shares of the bank's capital stock had not been sold and paid for, as required by law, but were held by the bank in the name of one of its officers. Westwater, the maker of the note, defended on the ground that the note was given without consideration and for the accommodation of the bank. It was held that if the maker executed the note with knowledge that it was to be used to deceive the Comptroller of the Currency, the receiver was entitled to enforce it against him.[10]

It should be noted that Westwater, unlike the defendant in the instant case, was neither a director nor a share-

[10] In *Westwater* v. *Murray*, (C. C. A. 6th, 1917) 245 Fed. 427, a decision relating to a subsequent development of this case, the court stated:

> "The vital question of fact to be determined at the third trial of the case was, as Judge Gray stated, whether Westwater had 'any knowledge of the facts in regard to the use in which his paper (the note in suit) was to be put, as would make him a participant in the deception undoubtedly practiced by the officers of the bank upon the Comptroller of the Currency.' *Westwater* v. *Lyons*, 193 Fed. 823 • • • "

holder of the bank, nor interested in it in any other way, but was drawn into the picture by a friend, one of the directors of the bank, who persuaded him to "lend" it his note. *A fortiori* liability should be imposed where, as here, the maker of the note was not only aware of the deception to be practiced on the public examining authorities, but was a director and shareholder of the bank with a pecuniary interest to be served by the scheme in which he participated.

Federal Reserve Bank v. *Crothers*, (C. C. A. 4th, 1923) 289 Fed. 777, is particularly significant. The president of a national bank had persuaded Crothers to give the bank his note for $6,000 "to take the place of an equivalent of electric light plant bonds [constituting an excessive investment] for the satisfaction of the bank examiner". The bank failed, and the court held the receiver had the right to enforce the note. Counsel for the defendant relied upon *Rankin* v. *City National Bank*, *supra*. Although the court (Taft, Circuit Justice, Woods, Circuit Judge, and Groner, District Judge) distinguished the *Rankin* case, the decision indicates a disposition to confine the holding in that case to the particular facts there presented. The court stated (at page 779) that "public policy requires that the maker be estopped from denying his liability under such circumstances".

A similar view of the law was taken by the Circuit Court of Appeals for the Fifth Circuit in the case of *Bohning* v. *Caldwell*, (C. C. A. 5th, 1925) 10 F. (2d) 298, *cert.* denied (1926) 271 U. S. 663. The receiver of an insolvent national bank sued several of its directors on a note made by them and given to the bank to take the place of certain doubtful or worthless assets; "none of the makers of the note considered they would ever be called upon to pay it". The court held the note to be enforceable on the ground that

since the makers of the note were directors[1] and stockholders of the bank there was sufficient consideration for the note, and also that the directors were estopped to deny consideration. This decision is of particular significance inasmuch as in the course of its opinion the court referred to the case of *Pauly* v. *O'Brien*, *supra*, as stating the sound doctrine, after having considered and referred to the line of cases represented by *Peterson* v. *Tillinghast*, (C. C. A. 6th, 1931) 192 Fed. 287, which, as previously noted, purports to rest upon the *Rankin* case and which was relied upon by the Circuit Court of Appeals in the instant case.

Four years later the same Circuit Court of Appeals, composed of the same Circuit Judges (Walker, Bryan and Foster), reached the opposite conclusion in *Lensing* v. *Rayzor*, (C. C. A. 5th, 1930) 41 F. (2d) 224, *cert.* denied (1930) 282 U. S. 870, but in that case the note was executed in good faith by an outsider who was wholly unacquainted with banking business and was in entire ignorance of the fact that the note was to be used in a transaction designed to represent a fictitious sale of twenty shares of the bank's own stock. The court took special care to point out that the maker was not a stockholder, **director**, or officer, thus indicating clearly that in circumstances such as exist in the instant case, where the note was executed by a director of the bank who had full knowledge of the illegality of the transaction, it would have applied its previous decision in *Böhning* v. *Caldwell*, *supra*. The court stated that under certain circumstances the fulfillment of a duty by an officer of a bank is sufficient consideration for an accommodation note.

[1] The National Bank Act requires that

"Each director, when appointed or elected, shall take oath that he will, so far as the duty devolves upon him, diligently and honestly administer the affairs of such association, and will not knowingly violate or willingly permit to be violated any of the provisions of this title, * * * ". (Sec. 5147 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 73)).

Attention is also directed to *Utley* v. *Clarke, et al.*, (D. N. Y. 1936) 16 F. Supp. 435, where the court adopted the view of the law here contended for by the petitioner. In that case a director sought to recover from the receiver of an insolvent national bank certain securities which he had placed in the custody of the bank's officers for the purpose of giving them the appearance of assets of the bank. The court held the plaintiff estopped to assert this claim, since he had been a party to the deception of the Comptroller of the Currency, and of the depositors and creditors of the bank. The decision recognizes that the real parties in interest in these cases are the depositors and creditors, although the receiver is the party to the suit in their interest.

The appellate courts of a majority of the states have considered the question of the rights of the receiver of an insolvent banking institution with respect to promissory notes given to it for inclusion in its purported assets in order to deceive the public examining authorities. These decisions of the state courts have related to both national and state banks. The notes involved in such cases were used for various deceptive purposes: to conceal illegal holdings by a bank of its own stock, to "reduce" excessive loans, to "eliminate" unsound or criticized assets, and for numerous other reasons bearing on the soundness of the bank's financial position. Almost without exception, the courts of these jurisdictions have upheld the rights of the depositors and creditors represented by the receiver. Several different theories have been developed and advanced to support this result, but the outstanding fact is the uniformity with which the courts have concluded that persons in Greaney's position must not be permitted to escape liability.[12]

[12] In addition to the cases cited hereinafter in this section, see *Fischer* v. *Hammond*, (1927) 32 Ariz. 423, 259 Pac. 676; *Ashley* v. *Rowe*, (1931) 101 Fla. 140, 133 So. 551; *Boller* v. *Field*, (1931) 260 Ill. App. 488, 492; *Nelson* v. *Colegrove*, (1932) 265 Ill. App. 488; *German-American State Bank* v. *Watson*, (1917) 99 Kan. 686, 163 Pac. 637; *Bank of Slater* v. *Union Station Bank*, (1920) 283

In some jurisdictions it has been held that adequate consideration exists for notes thus given to banks, especially where the maker is a director and shareholder, as in this case. This was the primary basis of decision in *New* v. *Page* (1924), 144 Md. 606, 125 Atl. 403; *Hurd* v. *Kelley* (1879), 78 N. Y. 588; *State ex rel. Lattanner* v. *Hills* (1916), 94 Ohio St. 171, 113 N. E. 1045; *First National Bank* v. *Boxley* (1927), 129 Okla. 159, 264 Pac. 184; *Arthur* v. *Brown* (1912), 91 S. C. 316, 74 S. E. 652.

Other courts have decided on principles of estoppel that such a defendant may not be heard to deny the validity of the note which he gave for the very purpose of deceiving examiners and depositors. However, few courts have deemed it necessary to work out all the elements of technical estoppel; it is simply stated that in these circumstances the maker of the note is "estopped" to contradict the validity of his note by evidence of a secret agreement not to enforce it. *Day* v. *Farmers' & Merchants' Bank* (1924), 229 Ala. 372, 157 So. 439; *Murphy, Receiver* v. *Gumaer* (1902), 18 Colo. App. 183, 70 Pac. 800; *Iglehart* v. *Todd* (1931), 203 Ind. 427, 178 N. E. 685; *Hayes* v. *Addy* (1934), 139 Kan. 481, 32 P. (2d) 243; *Bell* v. *Johnson* (1935), 142 Kan. 360, 46 P. (2d) 886; *Denny* v. *Fishter* (1931), 238 Ky. 127, 36 S. W. (2d) 864; *German-American Finance Corporation* v. *Merchants' and Manufacturers' State Bank* (1929), 177 Minn. 529, 225 N. W. 891; *Best* v. *Thiel* (1879), 78 N. Y. 15; *Bay Parkway National Bank* v. *Shalow* (1936), 270 N. Y. 172, 200 N. E. 685; *Peterson* v. *Baird* (1933), 63 N. D. 604, 249 N. W. 690; *Shaw* v. *Borchers* (Tex. 1932), 46 S. W. (2d) 967.

Mo. 308, 320, 222 S. W. 993, 996; *Mt. Vernon Tr. Co.* v. *Bergoff*, (1936) 272 N. Y. 192, 5 N. E. (2d) 196; *Engen* v. *Matthys*, (1923) 50 N. D. 487, 196 N. W. 550; *Brand* v. *Korth*, (Tex. 1936) 99 S. W. (2d) 285; *First Nat. Bank* v. *Brownson*, (Tex. Civ. App. 1937) 106 S. W. (2d) 1076; *West Rutland Tr. Co.* v. *Houston*, (1932) 104 Vt. 204, 158 Atl. 69; *Webb* v. *Pleasants*, (1926) 144 Va. 516, 519; 132 S. E. 175, 176; *Moore* v. *Kildall*, (1920) 111 Wash. 504, 191 Pac. 394; *Schwenker, Commissioner of Banking* v. *Teasdale*, (1931) 206 Wis. 275, 239 N. W. 434.

A third group of courts has held that the result is required by public policy, and that to permit schemes of this sort to be carried out without liability would weaken and jeopardize the banking structure of the country and popular confidence therein.[13] Only a few of the decisions in this field are based exclusively upon public policy or upon any one of the other theories which have been used to support the result reached. For example, in *Schmid* v. *Haines* (1925), 115 N. J. L. 271, 178 Atl. 801, the court enforced the note on the ground of "estoppel", but continued: "This estoppel is rooted in what has been termed 'good morals and sound public policy'." Accord: *Niblack* v. *Farley* (1919), 286 Ill. 536, 122 N. E. 160; *Cedar State Bank* v. *Olson* (1924), 116 Kan. 320, 226 Pac. 995; *Parker* v. *Parker* (1938), 287 Mich. 49, 282 N. W. 897; *Vallely* v. *Devaney* (1923), 49 N. D. 1107, 194 N. W. 903; *Putnam* v. *Chase* (1923), 106 Ore. 440, 212 Pac. 365; *Lyons* v. *Benney* (1911), 230 Pa. 117, 79 Atl. 250; see *Rothschild* v. *Manufacturers Trust Company* (1939), 279 N. Y. 355, 18 N. E. (2d) 527. It is submitted that reasons of public policy underlie the extension of the doctrines of estoppel and consideration in many decisions to encompass transactions of this nature. See Brannan, Negotiable Instruments Law (6th Ed. 1938) 459.

There is considerable divergence of opinion as to whether a going bank may enforce such notes on its own behalf,[14]

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[13] See Section D; *infra*.

[14] Going bank may enforce: *Rogers* v. *First State Bank*, (1926) 79 Colo. 84, 243 Pac. 637; *Cedar State Bank* v. *Olson*, (1924) 116 Kan. 320, 226 Pac. 995 (cf. *Farmers' State Bank* v. *Montgomery*, (1929) 129 Kan. 203, 282 Pac. 741); *State Bank of Moore* v. *Forsyth*, (1910) 41 Mont. 249, 108 Pac. 914; *Bay Parkway Nat. Bank* v. *Shalom*, (1936) 270 N. Y. 172, 200 N. E. 685; *First National Bank* v. *Boxley*, (1927) 129 Okla. 159, 264 Pac. 184; *Bangor Trust Co.* v. *Christine*, (1929) 297 Pa. 64, 146 Atl. 545; *Warren National Bank* v. *Jamieson*, (1930) 301 Pa. 45, 151 Atl. 672; *Farmers' & Merchants' State Bank* v. *Perry*, (1925) 186 Wis. 93, 202 N. W. 179; See Brannan, Negotiable Instruments Law (6th ed. 1938) 454-457.

but no question appears to exist as to the liability of a director and shareholder of a bank who delivers his note to it for the very purpose of deceiving the examining authorities, where the deception continues until the bank's subsequent insolvency, and suit is brought on the note by the receiver for the benefit of the depositors and creditors.[15]

The following list, it is believed, includes all the reported decisions in this field which involve directors or persons occupying similar positions. Liability was imposed in every case. *Cedar State Bank* v. *Olson* (1924), 116 Kan. 320, 226 Pac. 996; *New* v. *Page* (1924), 144 Md. 606, 125 Atl. 403; *Prudential Trust Co.* v. *Moore* (1923), 245 Mass. 311, 139 N. E. 645; *International Trust Co.* v. *Wattendorf* (1926), 256 Mass. 323, 152 N. E. 306; *Parker* v. *Parker* (1938), 287 Mich. 49, 282 N. W. 897; *Skordal* v. *Stanton* (1903), 89 Minn. 511, 95 N. W. 449; *Hurd* v. *Kelley* (1879), 78 N. Y. 588; *Best* v. *Thiel* (1879), 78 N. Y. 15; *Peterson* v. *Baird* (1933), 63 N. D. 604, 249 N. W. 690; *State Bank of Pittsburg* v. *Kirk* (1907), 216 Pa. 452, 65 Atl. 932; *Skagit State Bank* v. *Moody* (1915), 86 Wash. 286, 150 Pac. 425; *Farm-*

Contra (*i.e.*, receiver may recover, but going bank may not): *Day* v. *Farmers' & Merchants' Bank*, (1934) 229 Ala. 372, 157 So. 439; *First Nat. Bank* v. *Reed*, (1926) 198 Cal. 252, 244 Pac. 368; *Murphy, Receiver* v. *Gumaer*, (1902) 18 Colo. App. 183, 70 Pac. 800; *Niblack* v. *Farley*, (1919) 286 Ill. 536, 122 N. E. 160, *semble*; *Golden* v. *Červenka*, (1917) 278 Ill. 409, 116 N. E. 273, 282, 283; *Myers* v. *Department of Financial Institutions*, (Ind. 1938) 14 N. E. (2d) 914; *Hayes* v. *Addy*, (1934) 139 Kan. 481, 32 P. (2d) 243; *Denny* v. *Fishter*, (1931) 238 Ky. 127, 36 S. W. (2d) 864; *German-American F. Corp.* v. *Merchants' & Manufacturers' Bank*, (1929) 177 Minn. 527, 225 N. W. 891; *Harrington* v. *Connor*, (1912) 51 Neb. 214, 70 N. W. 911; *Park Place Discount Co.* v. *Taylor*, (1937) 119 N. J. L. 253, 195 Atl. 520, *semble*; *Putnam* v. *Chase*, (1923) 106 Ore. 440, 212 Pac. 365; *Lyons* v. *Benney*, (1911) 230 Pa. 117, 79 Atl. 250; see note (1924) 38 *Harv. L. Rev.* 239; (1937) 4 *Univ. of Chic. L. Rev.* 484.

[15] See (1932) 45 *Harv. L. Rev.* 926.

ers' & Merchants' State Bank v. *Perry* (1925), 186 Wis. 93, 202 N. W. 179.[18]

It is submitted that despite the presence or absence of express reference thereto in the opinions, all of the decisions cited above have a single underlying basis: *i. e.*, sound public policy. The uniformity of the results reached in those cases evidences the existence of a policy underlying all public banking systems to guard against transactions (particularly on the part of bank officers and directors) designed to deceive the examining authorities and, through them, the depositors and the public.

(D) The provisions of the National Bank Act, especially with respect to examination and supervision of national banks by the Comptroller of the Currency, definitely indicate the existence of a policy to protect bank depositors and creditors, and the public, from such transactions.

There is no federal statutory provision expressly and specifically relating to the question here presented. However, the Acts of Congress relating to national banks evidence a purpose or underlying policy to assure effective examination, regulation, and supervision of such banks by the Comptroller of the Currency and his examiners. This basic policy must be recognized as an intrinsic, although implied, part of the National Bank Act, and problems arising in connection with such examination and supervision are, therefore, governed by the federal bank law rather than by the general law of the particular state in which the bank is located.[18a]

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[18] The District Court opinion in the instant case pointed out that

> "Greaney was a director of the old Boston bank as well as of the new Boston-Continental, and, as such, is chargeable with a higher degree of responsibility than either Karnow or Mahoney. • • • He was a director of the bank, • • • he had a more intimate knowledge of the transaction than either Karnow or Mahoney, and • • • he owed a duty to the depositors of the bank to protect their interests" (R. 16).

[18a] See *Cook County Nat. Bank* v. *United States*, (1882) 107 U. S. 445, 448, stating that the National Bank Act constitutes "by itself a complete system for the establishment and government of national banks."

The question presented by this case bears directly upon the effectiveness of the examining and supervisory functions of the Comptroller of the Currency, and consequently is of great importance with respect to the stability and proper management of the institutions which make up our public banking system. As was pointed out in the dissenting opinion in *Deitrick* v. *Standard Surety Company* (1938), 303 U. S. 471, 481, it has long been recognized that even in the case of a going bank the rights of depositors and the public would be jeopardized unless given protection in addition to that afforded by the bank's officers elected by the stockholders. The most effective measure employed by the Government to protect the depositors and the public from just such hazardous departures from sound and safe banking practices is the conduct of thorough periodic examinations by national bank examiners appointed by the Comptroller and the requirement that national banks submit periodic reports to the Comptroller. Sections 5240 and 5211 of Rev. Stat. of 1873, as amended (U. S. C. title 12, secs. 481 and 161, respectively. See Appendix). This objective of the legislation would be frustrated if officers and directors of national banks could with impunity conspire to deceive and trick bank examiners.

The foundation of every banking system is public confidence. In view of the system of examination adopted by Congress, the mere fact that a national bank is open can be considered as a continuing invitation to the public to rely on its soundness and to feel assured that the Comptroller and his examiners deem the bank sound and honestly administered. The depositors and creditors have no power regarding the operation or management of a national bank and have no means of knowing the soundness of a bank except by reliance upon the statements publicly issued from time to time as prescribed by the Comptroller of the Currency and upon other action taken by the Comptroller for their protection. Therefore, it is imperative that the assets recorded on the public statements and the

notes and other obligations carried in the bank as assets thereof be genuine and enforceable obligations, so that examination will reveal the true condition of the bank. A rule of law permitting a director of a national bank to escape liability to the depositors and creditors of such a bank (or a receiver acting for their benefit) where the director, as a part of a conspiracy with other bank officials to deceive the Comptroller and his examiners, and through them the public, as to the true condition of the bank, and to conceal from them the commission of a highly dangerous violation of the banking laws,[17] has placed among the assets of the bank an obligation *prima facie* valid and enforceable but subject to a secret agreement that it was not to be enforced, would defeat the entire purpose of the regulatory statutes and would be in conflict with sound public policy.

That this question is a matter of unusual public concern has been recognized increasingly in recent years, as indicated by the tendency of courts to rely less upon the technical doctrine of estoppel, but rather to deny to the maker of an obligation such as that involved in this case the right to set up a defense such as that claimed by Director Greaney, upon the broad principle of public policy that the stability of banks and public confidence in our banking structure must not be jeopardized by spurious transactions of this character. The change in emphasis is clearly reflected in two important decisions handed down during the current year. In *O'Keefe* v. *Equitable Trust Co.* (C. C. A. 3d, 1939), 103 F. (2d) 904, 908, the court said:

> "And again, a fortiori, will the policy apply to banks, institutions whose raison d'etre should guarantee the identity of reality and appearance. As a distinguished

[17] In order to protect the public from a practice which, if permitted, would dangerously impair the capital of national banks, the National Bank Act prohibits such banks from purchasing shares of their own capital stock, as was done in this case. See page 2, note 1, *supra*.

court and a learned professor of law put it: 'The state cannot sanction any device intended to give a false appearance to a transaction or increase the apparent stability of a bank, * * * Public policy requires that a person who, for the accommodation of the bank executes an instrument which is in form a binding obligation, should be estopped from thereafter asserting that simultaneously, the parties agreed that the instrument should not be enforced.' Mount Vernon Trust Co. v. Bergoff, 272 N. Y. 192, 197, 5 N. E. (2d) 196, 197.

"* * * It is interesting to observe that the later cases place their decisions squarely on the ground of public policy and do not strain at an enlarged concept of consideration or an hypothetical estoppel."

And in *Rothschild* v. *Manufacturers Trust Co.* (1939), 279 N. Y. 355, 359, 18 N. E. (2d) 527, 529, the Court of Appeals of New York forcibly enunciated the same principle:

"An agreement, valid and enforcible if made by an ordinary corporation or business, may, by reason of public policy, be void and unenforcible against a banking institution. Thus, where a bank brings suit on a promissory note, the defendant may not plead lack of consideration and an agreement not to enforce the instrument, since the defendant knows or was chargeable with knowledge that the note might be used to conceal the actual transaction. * * * The public policy behind these rulings is that the stability of banks is a matter of such public concern that the State should not sanction any device intended to give a false appearance to a transaction or increase the apparent stability as contrasted with the true condition of a bank."

To the effect that the business of banking is affected with a public interest and that public policy requires the state to take the necessary steps by way of regulation, supervision, and restriction, as a matter of public policy, to protect the depositors and insure the soundness of banks and that the statutes passed in that connection are designed for that purpose. See: *Noble State Bank* v. *Haskell*, (1911), 219 U. S. 104, 111-13; *Easton* v. *Iowa*, (1903), 188 U. S. 220, 238; *Guthrie* v. *Harkness*, (1905), 199 U. S. 148, 158.

III.

If This Case is Governed by the Law of Massachusetts, the Decision of the Circuit Court of Appeals Should be Reversed Because Contrary to the Controlling Decisions of the Supreme Judicial Court of Massachusetts.

If this Court determines that the situation here presented is not governed by the National Bank Act on the basis set forth in the preceding section of this brief, then the interpretation, validity and enforcedability of the note, which was executed in, and payable in, Massachusetts, are governed by the law of that State, under the doctrine of *Erie R. Co.* v. *Tompkins*, (1938) 304 U. S. 64, and *Ruhlin* v. *New York Life Insurance Co.*, (1938) 304 U. S. 202.

The suit here involved was instituted by the receiver of a national bank to enforce a promissory note executed by a director of the bank (R. 4-5), who seeks to avoid liability by asserting a defense based on lack of consideration and illegality (R. 9). Thus the question presented to this Court is whether in view of the circumstances, interests and persons involved, the defendant may interpose such a defense in such suit. It is the contention of the petitioner that Greaney is not entitled to defend on these grounds as against the receiver as representative of the depositors and creditors of the Boston-Continental National Bank, to which Greaney gave his note to deceive the public examining authorities.

The common law rule of the State of Massachusetts applicable to those facts is such that if it had been applied by the Circuit Court of Appeals, the decree of the District Court holding Greaney liable on the note here in question necessarily would have been affirmed.

The controlling decision in Massachusetts is *Prudential Trust Co.* v. *Moore*, (1923) 245 Mass. 311, 139 N. E. 645. In that case, directors of a bank executed and delivered promissory notes to it in order to replace certain excessive loans on the books of the bank and thereby "to prevent the closing of the bank", the makers having been assured by the president of the bank "that they were really assuming

no liability at all". Thereafter, the bank was closed, insolvent, with these notes ostensibly among its assets. After pointing out that the defendants not only had a financial interest as stockholders in maintaining the solvency of the bank, but as directors they were under a legal responsibility akin to that of trustees, thus supplying consideration for their notes, the Supreme Judicial Court of Massachusetts held the directors "estopped from denying the legal validity of these notes which the bank commissioner is now attempting to collect for the benefit of creditors of the bank." The Court stated that it would be unjust and fraudulent to permit these directors "to now plead the invalidity of the very securities by which they induced others to make and leave deposits with the bank". Accordingly, the Court held that the public officials representing the bank's depositors and other creditors were entitled to enforce the notes.

In *International Trust Co. v. Wattendorf* (1926), 256 Mass. 323, 152 N. E. 306, in deciding a similar case, the Supreme Judicial Court of Massachusetts stated that a note given by a **director** to a banking institution to take the place of another note which had been previously substituted for illegal investments, was not without consideration, since the director was interested in the prosperity of the bank, the value of his stock depended on its success and continued operation, and the suspension of the bank not only might mean the loss of his investment but also might subject him to liability as a director and as a stockholder.

The pertinent facts of the instant case are almost identical with those of *Prudential Trust Co.* v. *Moore*, *supra*, and *International Trust Co.* v. *Wattendorf*, *supra*, even to the extent that Greaney, the maker of the note, was a director of the bank,[18] as were the defendants in those cases. In fact, the circumstances of the present case even more strongly call for imposing liability on the maker of the

[18] Under Section 5146 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 72), as then in force, every director of a national bank the size of the Boston-Continental National Bank must have owned capital stock of the association having an aggregate par value of not less than $1,000.

note: In the *Prudential Trust Co.* case the directors were told by the bank president that "the situation involved simply a technical question" and could be cleared up in a few days, whereas in this case Greaney was entirely aware that the bank had acquired its own stock in violation of law and desired to conceal this fact from the bank examiners, the Comptroller of the Currency, and through them, the depositors and other creditors of the bank.

A decision of this Court holding that the law of Massachusetts is applicable to this case would find support in the significant fact that neither the federal court decisions relied upon by the Circuit Court of Appeals, nor any other decisions of the federal courts which are in accord therewith, have been based upon a consideration of specific provisions of the National Bank Act.[19]

It may also be of significance to this Court that the question here presented is not one with reference to which the state courts have felt obliged to ascertain and apply a federal rule in cases where a receiver of a national bank was involved. On numerous occasions this and analogous questions have been decided by state courts with respect to both national and state banks, and liability has been imposed without reference to any specific statutory provision or to any policy inferred from a specific legislative enactment. In the decision of such cases, the highest courts of the various states have invariably applied the same rules of law in cases where a receiver of a national bank was involved as in cases where a receiver of a state bank was involved.[20]

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[19] See cases cited in Section B, *supra*.

[20] See *Day* v. *Farmers & Merchants Bank*, (1934) 229 Ala. 372, 157 So. 439; *First Nat. Bank* v. *Reed*, (1926) 198 Cal. 252, 244 Pac. 368; *First Nat. Bank* v. *Felt*, (1897) 100 Iowa 680, 69 N. W. 1057; *Hayes* v. *Addy*, (1934) 139 Kan. 481, 32 P. (2d) 243; *Bay Parkway Nat. Bk.* v. *Shalom*, (1936) 270 N. Y. 172, 200 N. E. 685; *First Nat. Bk.* v. *Boxley*, (1927) 129 Okla. 159, 264 Pac. 184; *Lyons* v. *Bonney*, (1911) 230 Pa. 517, 79 Atl. 250; *First Nat. Bank* v. *Baer*, (1923) 277 Pa. 184, 120 Atl. 815; *First Nat. Bank* v. *Sagerson*, (1925) 283 Pa. 406, 129 Atl. 333; *Warren Nat. Bank* v. *Jamieson*, (1930) 301 Pa. 45, 151 Atl. 672; *First Nat. Bank* v. *Smith*, (Pa. 1938) 200 Atl. 215; *Federal American National Bank & Trust*

CONCLUSION.

It is respectfully urged that the Circuit Court of Appeals for the First Circuit erred in overruling the decision of the District Court, wherein judgment was rendered in favor of the receiver and against Director Greaney upon the note indebtedness here involved. It is submitted that the protection of the national banking system and the ends of justice demand that relief be granted to the receiver in aid of the depositors and other creditors of the bank, and that the final decree of the Circuit Court of Appeals for the First Circuit be reversed.

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Co. v. *Scott*, (Tex. Civ. App. 1937) 103 S. W. (2d) 1064. In *Lyons* v. *Benney*, *supra*, a national bank case very similar to the one now before the Court, the Supreme Court of Pennsylvania, referring to two of its own decisions involving state banks (*State Bank of Pittsburg* v. *Kirk*, 216 Pa. 452, and *Peoples Bank* v. *Stroud*, 223 Pa. 33), stated (230 Pa. at 117):

> "In each of them we held that the appellee, as receiver of an insolvent state bank, represented not only it, but its creditors, and counsel for the appellant have failed to convince us that the same rule does not apply to a receiver of a national bank appointed by the Comptroller of the Currency. Nor have we been persuaded that only directors or trustees of a corporation who have given notes for the purpose of increasing its assets or restoring its capital, should not be allowed to set up want of consideration in an action on the obligations by a receiver."

APPENDIX.

Sec. 5138 of Rev. Stat. of 1873, as amended (U. S. C. title 12 sec. 51):

> No national banking association * * * shall be organized in a city the population of which exceeds fifty thousand persons with a capital of less than $200,000 * * *.

Sec. 5139 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 52):

> The capital stock of each association shall be divided into shares of $100 each, or into shares of such less amount as may be provided in the articles of association, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired.

Sec. 5140 of Rev. Stat. of 1873 (U. S. C. title 12, sec. 53):

> At least 50 per centum of the capital stock of every association shall be paid in before it shall be authorized to commence business; and the remainder of the capital stock of such association shall be paid in installments of at least 10 per centum each, on the whole amount of the capital, as frequently as one installment at the end of each succeeding month from the time it shall be authorized by the Comptroller of the Currency to commence business; and the payment of each installment shall be certified to the comptroller, under oath, by the president or cashier of the association.

Sec. 5141 of Rev. Stat. (U. S. C. title 12, sec. 54):

> Whenever any shareholder, or his assignee, fails to pay any installment on the stock when the same is required by the preceding section to be paid, the directors

of such association may sell the stock of such delinquent shareholder at public auction, having given three weeks' previous notice thereof in a newspaper published and of general circulation in the city or county where the association is located, or if no newspaper is published in said city or county, then in a newspaper published nearest thereto, to any person who will pay the highest price therefor, to be not less than the amount then due thereon, with the expenses of advertisement and sale; and the excess, if any, shall be paid to the delinquent shareholder. If no bidder can be found who will pay for such stock the amount due thereon to the association, and the cost of advertisement and sale, the amount previously paid shall be forfeited to the association, and such stock shall be sold as the directors may order, within six months from the time of such forfeiture, and if not sold it shall be canceled and deducted from the capital stock of the association. If any such cancellation and reduction shall reduce the capital of the association below the minimum of capital required by law, the capital stock shall, within thirty days from the date of such cancellation, be increased to the required amount; in default of which a receiver may be appointed, according to the provisions of section fifty-two hundred and thirty-four, to close up the business of the association. [Sec. 5234 of Rev. Stat. of 1873, as amended, appears as Sec. 192 of the U. S. Code.]

Sec. 5146 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 72):

* * * Every director must own in his own right shares of the capital stock of the association of which he is a director the aggregate par value of which shall not be less than $1,000, unless the capital of the bank shall not exceed $25,000 in which case he must own in his own right shares of such capital stock the aggregate par value of which shall not be less than $500. Any director who ceases to be the owner of the required number of shares of the stock, or who becomes in any other manner disqualified, shall thereby vacate his place.

Sec. 5147 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 73):

> Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate or willingly permit to be violated any of the provisions of this title, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by this title, subscribed by him, or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged, as security for any loan or debt. • • •

Sec. 5201 of Rev. Stat. of 1873 (U. S. C. title 12, sec. 83):

> No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association, according to section 192 of this title.

Sec. 5204 of Rev. Stat. of 1873 (U. S. C. title 12, sec. 56):

> No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained by any such association, equal to or exceeding its undivided profits then on hand, no dividend shall be made; and no dividend shall ever be made by any association, while it continues its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. • • •

Sec. 5205 of Rev. Stat. of 1873 (U. S. C. title 12 sec. 55):

> Every association which shall have failed to pay up its capital stock, as required by law, and every associa-

tion whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders pro rata for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four. [Sec. 5234 of Rev. Stat. of 1873, as amended, appears as Sec. 192 of the U. S. Code.]

Sec. 5209 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 592):

Any officer, director, agent, or employee * * * of any national banking association * * * who makes any false entry in any book, report, or statement of * * * such national banking association * * *, with intent in any case * * * to deceive * * * the Comptroller of the Currency, * * * or any agent or examiner appointed to examine the affairs of * * * such national banking association * * *, and every person who, with like intent, aids or abets any officer, director, agent, employee, or receiver in any violation of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof in any district court of the United States shall be fined not more than $5,000 or shall be imprisoned for not more than 5 years, or both, in the discretion of the court.

Sec. 5239 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 93):

If the directors of any national banking association shall knowingly violate, or knowingly permit any of

the officers, agents, or servants of the association to violate any of the provisions of this chapter, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper district, or Territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

Sec. 5240 of Rev. Stat. of 1873, as amended (U. S. C. title 12, secs. 481 and 484):

The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall appoint examiners who shall examine every member bank at least twice in each calendar year and oftener if considered necessary * * *. The examiner making the examination of any national bank, or of any other member bank, shall have power to make a thorough examination of all the affairs of the bank and in doing so he shall have power to administer oaths and to examine any of the officers and agents thereof under oath and shall make a full and detailed report of the condition of said bank to the Comptroller of the Currency.

* * * * *

No bank shall be subject to any visitatorial powers other than such as are authorized by law, or vested in the courts of justice or such as shall be or shall have been exercised or directed by Congress, or by either House thereof or by any committee of Congress or of either House duly authorized.

Sec. 5211 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 161):

Every association shall make to the Comptroller of the Currency not less than three reports during each year, according to the form which may be prescribed

by him, verified by the oath or affirmation of the president, or of the cashier, or of a vice president, or of an assistant cashier of the association designated by its board of directors to verify such reports in the absence of the president and cashier, taken before a notary public properly authorized and commissioned by the State in which such notary resides and the association is located, or any other officer having an official seal, authorized in such State to administer oaths, and attested by the signature of at least three of the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him specified, and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him; and the statement of resources and liabilities, together with acknowledgment and attestation in the same form in which it is made to the Comptroller, shall be published in a newspaper published in the place where such association is established, or if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to obtain a full and complete knowledge of its condition.